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UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 SAN JOSE DIVISION

THOMAS LEONARD, et al., Plaintiffs, v. BIMBO BAKERIES USA, INC., et al., Defendants.	No. C 05-00829 JW (HRL) SECOND CASE MANAGEMENT STATEMENT OF DEFENDANTS BIMBO BAKERIES USA, INC. AND GEORGE WESTON BAKERIES, INC.; DECLARATION OF BETSY CARROLL <hr/> Date: November 19, 2007 Time: 9:00 a.m. Place: Department 8 Judge: Hon. James Ware
And Related Action KATHLEEN MORRISON, et al., Plaintiffs, v. BIMBO BAKERIES USA, INC., et al., Defendants.	No. C 07-03156 JW

Pursuant to Local Rule 16-9, Defendant Bimbo Bakeries USA, Inc. ("BBU")
 hereby submits its Case Management Statement in the above-entitled actions.

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1 1. Jurisdiction and Service

2 The basis for the court's subject matter jurisdiction over Plaintiffs' claims is
3 subject matter jurisdiction of the claims under the Fair Labor Standards Act, and diversity
4 jurisdiction under the Class Action Fairness Act.

5 There are no issues regarding personal jurisdiction or venue. Defendants have
6 already generally appeared and have never challenged venue.

7 As to parties to be served, Bestfoods Baking Company, Inc. is named as an
8 employer in the Collective Bargaining Agreement ("CBA"). The parties have not been able to
9 resolve the status of this named Defendant. Plaintiffs claim to have served an entity called
10 "Bestfoods Baking Company" through COURT Corporation in Chicago, Illinois; however,
11 defense counsel has advised Plaintiffs' counsel that to their knowledge Defendant BBU is not
12 related to that entity nor, to BBU's knowledge, has that entity ever employed these RSRs. BBU
13 has no position on Plaintiffs' attempts to serve or involve Bestfoods as it does not represent
14 Bestfoods and believes there is no relationship to that party and this lawsuit nor has it seen a
15 proof of service upon Bestfoods.

16 However, there is an indemnification agreement between BBU and George
17 Weston Bakeries, Inc. ("George Weston"), with regard to the types of claims set forth in this suit.
18 Defendants believe that George Weston should be dismissed from this lawsuit and have asked
19 that George Weston be dismissed from this suit in view of the indemnification agreement.

20 2. Facts

21 a. Brief Chronology

22 BBU is a wholesale baking business with a multi-regional distribution of baked
23 goods throughout the United States. Plaintiffs are current or former employees of BBU,
24 employed as commissioned driver salesmen commonly known in the baking industry as route
25 sales representatives ("RSRs"). The RSRs' employment at BBU is governed by a CBA, with
26 each sales/delivery route bid for on the basis of seniority under the terms of the applicable CBA.
27 The CBA to the *Leonard* Plaintiffs addresses all of the terms and conditions of employment. The
28 employment of Plaintiffs in the related *Morrison* action is governed by a different CBA, which

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1 applies in Southern California. That CBA also addresses all of the terms and conditions of
2 employment.

3 Plaintiffs in the *Leonard* action filed a complaint against Bestfoods Baking
4 Company, Inc. (“Bestfoods”) and Bimbo Bakeries USA, Inc. (“BBU”) on February 25, 2005
5 alleging both a class action for state wage and hour claims and a collective action for alleged
6 violation of federal wage and hour laws. George Weston, a wholesale baking company, the
7 western division of which was acquired by BBU, received the complaint, and George Weston
8 tendered the complaint to BBU. Defendants BBU and George Weston have answered the
9 complaint, but Bestfoods, which to BBU’s knowledge does not employ RSRs and is not
10 connected with the answering parties, nor represented by their counsel has not responded. The
11 answering Defendants deny all of the material allegations in the Complaint and set forth
12 numerous affirmative defenses. Defendants do not believe there is factual or legal merit to any of
13 the asserted claims. Defendants have abided by both state and federal law in all aspects of the
14 RSRs’ employment and this will become evident as the lawsuit progresses. Defendants
15 emphatically disagree with Plaintiffs’ characterization that the RSRs “are not paid for sales.” The
16 RSRs are paid primarily on commissions they earn through selling product to the stores on their
17 routes and the primary job responsibility of the RSRs is to sell. Moreover, Defendants
18 emphatically deny (and the RSRs’ own admissions contradict) Plaintiffs’ contention that the
19 RSRs uniformly work nine to 11 hours per day and work without breaks. BBU contends that the
20 overwhelming evidence is to the contrary and the RSRs (and counsel for them) have admitted that
21 the RSRs can and do take meal breaks and rest breaks.

22 The Court ruled on cross motions for summary judgment and/or partial summary
23 judgment filed by the parties, denying Plaintiffs’ motion. As to BBU’s motion for summary
24 judgment in the *Leonard* action, the Court ruled on September 28, 2007, that Plaintiffs’ FLSA
25 minimum wage and FLSA recordkeeping claims have no merit and should be dismissed. The
26 court also ruled that Plaintiffs’ FLSA overtime claims have no merit for the period prior to
27 August 10, 2005, but that Plaintiffs’ FLSA overtime claims for the period after August 10, 2005
28 survive Defendants’ motion for summary judgment and remain in the case so that the fact finder
can hear evidence on the weight of vehicles driven by the RSRs. The Court also granted
summary judgment, dismissing the named Plaintiffs’ California state overtime and minimum

wage claims. Proposed class members' California overtime and minimum wage claims should fail for the same reasons, as the law applies to them as well.

Plaintiffs in the *Morrison* action are also former RSRs employed by Defendants in California. The *Morrison* Plaintiffs, apparently unaware of the *Leonard* action pending in this Court, filed their Complaint in Orange County Superior Court on December 29, 2006, alleging overtime, meal and rest period, wage statement, and related claims. As with *Leonard*, the answering Defendants deny all of the material allegations in the Complaint and set forth numerous affirmative defenses. Defendants do not believe there is factual or legal merit to any of the asserted claims for the same reasons as apply to the *Leonard* Plaintiffs. Defendants have abided by both state and federal law in all aspects of the RSRs' employment and this will become evident as the lawsuit progresses. BBU removed the *Morrison* case to the United States District Court for the Central District of California, and then moved to stay, dismiss, or transfer the case on the grounds that it is duplicative of *Leonard*. The Court transferred *Morrison* to the Northern District, and on September 28, 2007, in the same order granting in part BBU's summary judgment motion in *Leonard*, the Court deemed *Morrison* related to *Leonard*. In that order, the Court denied without prejudice BBU's request to consolidate the two actions, pending further discussion at the upcoming Case Management Conference.

b. Principal Factual Issues in Dispute

a. Whether Plaintiffs and the proposed class members were properly compensated under applicable state and federal law. The Court's order granting in part Defendants' summary judgment motion on Plaintiffs' California overtime and minimum wage claims applies only to the six named *Leonard* Plaintiffs. However, proposed class members' California state claims will fail for the same reasons as the named Plaintiffs' claims have failed.

b. Whether Plaintiffs and the members of the conditionally certified collective action qualify for the Motor Carrier Act exemption such that they are exempt employees pursuant to section 13(b)(1) of the Fair Labor Standards Act ("FLSA") for the period from August 10, 2005 onward.

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1 c. Whether Plaintiffs and the members of the conditionally certified
2 collective action are exempt outside salespersons pursuant to section 13(a)(1) of the FLSA.

3 d. Whether the proposed class members are exempt from the overtime
4 compensation and meal and rest period requirements contained in the California Labor Code and
5 in the wage orders of the Industrial Wage Commission (the Court's order granting in part
6 Defendants' summary judgment motion on Plaintiffs' California overtime claims applies only to
7 the six named *Leonard* Plaintiffs. However, proposed class members' California state overtime
8 claims will fail for the same reasons as the named Plaintiffs' claims have failed).

9 e. Whether, if Defendants were required to provide meal periods, Defendants
10 did so.

11 f. Whether the proposed class members were not paid for all their work, i.e.
12 whether they worked "off the clock" in violation of California law (Plaintiffs' minimum wage
13 claim has already been dismissed as to the named Plaintiffs and should fail for the same reasons
14 for proposed class members).

15 g. Whether Plaintiffs and the proposed class members received accurate
16 itemized wage statements as required under the California Labor Code.

17 h. Whether, if Plaintiffs and the proposed class members did not receive
18 accurate itemized wage statements, they suffered any injury.

19 i. Whether Plaintiffs and the proposed class members received payment of
20 all wages due upon termination of employment.

21 j. Whether Plaintiffs and the proposed class members have similar job
22 requirements, conditions and pay provisions such that a collective action is warranted.

23 k. Whether, under Fed. R. Civ. Proc. 23(a), the alleged class is so numerous
24 that joinder of all members would be impracticable.

25 l. Whether, under Fed. R. Civ. Proc. 23(a), there are questions of law or fact
26 common to the alleged class.

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1 m. Whether, under Fed. R. Civ. Proc. 23(b)(3), any such common questions
2 of law or fact common to the alleged class predominate over individualized issues and whether a
3 class action would be the superior method for adjudication of this dispute.

4 n. Whether, under Fed. R. Civ. Proc. 23(a), Plaintiffs' claims are typical of
5 the claims of the proposed class.

6 o. Whether, under Fed. R. Civ. Proc. 23(a), the representative parties will
7 fairly and adequately protect the interests of the alleged class.

8 p. Whether Plaintiffs can meet the alternative requirements for certification
9 under Fed. R. Civ. Proc. 23(b).

10 3. Legal Issues

11 a. Whether Plaintiffs and the proposed class members are exempt from the
12 overtime provisions of the FLSA for the period from August 10, 2005 onward under either the
13 Motor Carrier exemption or the outside sales exemption.

14 b. Whether the Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq., was
15 violated.

16 c. Whether there was any willful violation by defendants of the FLSA.

17 d. Whether Plaintiffs and the proposed class members are subject to the
18 California outside sales exemption.

19 e. Whether the proposed class members are subject to the California CBA
20 exception to overtime.

21 f. If the proposed class members are not exempt from overtime, the proper
22 calculation of overtime pay, based not just on hourly straight time but also on bonus earnings.

23 g. Whether the proposed class members were properly compensated for all
24 time worked under California law.

25 h. Whether any wage order of the California Industrial Welfare Commission
26 was violated.

27 i. Whether California Labor Code section 1194, governing overtime wages,
28 was violated.

j. Whether California Labor Code section 226, governing itemized wage statements, was violated.

k. Whether California Labor Code section 203, governing payment of wages upon termination, was violated.

l. Whether California Business and Professions Code section 17200 was violated.

m. Whether Plaintiffs and the proposed class members are entitled to recover damages, restitution, or other amounts.

n. Whether any portion of the claims of Plaintiffs and the proposed class members claims are barred by any applicable statute of limitations.

o. Whether Plaintiffs and the class members have similar job requirements, conditions and pay provisions such that a collective action is warranted.

p. Whether, under Fed. R. Civ. Proc. 23(a), the alleged class is so numerous that joinder of all members would be impracticable.

q. Whether, under Fed. R. Civ. Proc. 23(a), there are questions of law or fact common to the alleged class.

r. Whether, under Fed. R. Civ. Proc. 23(b)(3), any such common questions of law or fact common to the alleged class predominate over individualized issues and whether a class action would be the superior method for adjudication of this dispute.

s. Whether, under Fed. R. Civ. Proc. 23(a), Plaintiffs' claims are typical of the claims of the proposed class.

t. Whether, under Fed. R. Civ. Proc. 23(a), the representative parties will fairly and adequately protect the interests of the alleged class.

u. Whether Plaintiffs can meet the alternative requirements for certification under Fed. R. Civ. Proc. 23(b).

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1 4. Motions

2 a. Motion for Conditional Certification of the FLSA Collective Action:

3 On December 27, 2005, the Court granted in part Plaintiffs' motion for
4 conditional certification of a FLSA collective action. As part of this order, the Court ordered the
5 parties to file proposed notices to the conditional class. Proposed notices were filed, but the
6 parties were not able to agree on the form of the notice. Then, the parties stipulated to stay the
7 issuance of court-facilitated notice until the Court ruled upon the parties' cross-motions for
8 summary judgment. The Court granted the parties' stipulation on May 8, 2006.

9 Defendants' position is that any proposed notices that were submitted in 2005 are
10 no longer appropriate as a result of the Court's ruling on the parties' cross motions for summary
11 judgment and/or summary judgment. Further, BBU believes that notice at this point would be
12 improper because BBU has strong grounds to move for decertification of the conditionally-
13 certified collective action and to oppose class certification in this matter based upon the
14 predominance of individualized issues and other factors. Otherwise, needless cost and business
15 interruption would ensue. Pending the Court's determination of the certification motions that
16 will be filed, BBU has offered to continue the tolling on the statute of limitations that has been in
17 place.

18 b. Cross-Motions for Summary Judgment: The parties engaged in discovery
19 and filed cross motions for summary judgment. The Court issued its ruling on the motions for
20 summary judgment September 28, 2007. The Court granted in part BBU's summary judgment
21 motion and denied Plaintiffs' motion. The Court's decision on the motions for summary
22 judgment is as follows:

23 "The Court grants summary judgment with respect to the following claims:

24 "1. Failure to pay minimum wages in violation of the FLSA.

25 "2. Failure to maintain records in violation of the FLSA.

26 "3. Failure to pay overtime in violation of California Labor Code section 1194.

27 "The following claims remain in the action:

28 "1. Failure to provide meal breaks.

1 “2. Failure to pay wages on ending of employment [Labor Code 203]

2 “3. Failure to provide itemized wage statements.

3 “4. Failure to pay overtime in violation of the FLSA (after August 10, 2005).

4 “5. Violations of California Business and Professions Code section 17200.”

5 The portions of the Court’s order granting summary judgment on Plaintiffs’

6 California law claims apply only to the named Plaintiffs. Proposed class members’ California
7 overtime and minimum wage claims should fail for the same reasons.

8 c. Motion for Rule 23 Class Certification: BBU plans to file a motion for a
9 determination that this action is not appropriate for class treatment and a motion seeking to have
10 the conditionally certified collective action decertified.

11 5. Amendment of Pleadings

12 Defendants may join the union as an indispensable party.

13 6. Evidence Preservation

14 Subject to any well-founded objections, Defendants have produced all non-
15 privileged documents responsive to Plaintiffs’ document requests in this action. A litigation hold
16 has been in place since the action was filed.

17 7. Disclosures

18 The parties have disclosed pursuant to Fed. Rule of Civ. Proced. Rule 26. The
19 disclosures should be considered supplemented by the evidence produced by the parties in their
20 motions for summary judgment. The disclosures have been so manifold that description here
21 would be unduly voluminous.

22 8. Discovery

23 Defendants have propounded document requests, special interrogatories, and
24 requests for admissions to the named Plaintiffs and the opt-in Plaintiffs.

25 Defendants have deposed the six named *Leonard* Plaintiffs and five opt-in
26 Plaintiffs. Plaintiffs stipulated to permit Defendants to exceed 10 depositions so that Defendants
27 could depose the fifth opt-in Plaintiff deponent. The parties have not stipulated that Defendants

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1 may take any additional depositions at this point. If the *Leonard* and *Morrison* actions are
2 consolidated Defendants anticipates that they would need to depose the *Morrison* Plaintiffs.

3 Plaintiffs took the deposition of BBU pursuant to Fed. R. Civ. Proc. 30(b)(6).
4 Plaintiffs specified approximately 20 deposition topics, for which BBU produced five witnesses.
5 Defendants understand that Plaintiffs believe they may re-depose BBU as a matter of right.
6 Plaintiffs cannot as a matter of right re-depose any witnesses that have already been deposed in
7 this action, including the deposition of BBU pursuant to Rule 30(b)(6), and in any event,
8 discovery in this action is complete or nearly complete. The scope includes all liability and
9 damages issues, as well as issues pertaining to class certification under Rule 23. There is support
10 in the case law for the proposition that a 30(b)(6) deposition may be noticed one and only one
11 time and that Plaintiffs have already served a 30(b)(6) deposition notice specifying many topics,
12 and that BBU produced witnesses in response. Plaintiffs also took the deposition of BBU's
13 Human Relations Manager, Laura Thompson-McCann.

14 Plaintiffs propounded 19 interrogatories to Defendants. Plaintiffs propounded
15 two sets of requests for admissions to Defendants, and several sets of requests for production.

16 Discovery Plan

17 The parties stipulated to the following discovery plan in the parties' initial Joint
18 Case Management Statement and Proposed Order file June 27, 2005:

19 a. The non-expert discovery cutoff in this case shall be thirty (30) days
20 before trial.

21 b. The expert discovery cutoff in this case shall be fifteen (15) days before
22 trial.

23 c. Any and all written discovery will be propounded such that a response
24 shall be due on or before the discovery cutoff date.

25 d. If a party chooses to designate for trial any expert witnesses under Fed. R.
26 Civ. Proc. 26(a)(2), said designation shall be made by sixty (60) days before the date of trial, as it
27 may be continued from time to time.

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1 e. If a party chooses to designate any rebuttal expert witnesses in response to
2 the other party's initial expert witness designation, said designation shall be made by thirty (30)
3 days before trial.

4 g. The parties have stipulated to a protective order.

5 8.A. Consolidation and its Effect on Discovery

6 Defendants understand that the parties are in agreement that consolidation of
7 *Leonard* and *Morrison* is appropriate. If the Court agrees to consolidate the two actions,
8 Defendants object to duplicative discovery; particularly, Defendants believe that Plaintiffs
9 should not be permitted to re-depose any witnesses whom Plaintiffs have already deposed in this
10 action, including the 30(b)(6) deposition of BBU and further, that discovery in this action should
11 be nearly complete.

12 9. Class Actions

13 Defendants contend that this action is not well suited as a class action (nor as a
14 FLSA collective action) because Plaintiffs cannot show they can satisfy all of the requirements
15 of Rule 23(a), in particular the showing of commonality required by subsection (2), the showing
16 of typicality required by subsection (3), and the showing of adequacy required by subsection (4).
17 Further, this action is not maintainable under Fed.R.Civ.P. 23(b)(2) because Plaintiffs' primary
18 claim is for damages, and this action is not maintainable under Fed.R.Civ.P. 23(b)(3) because
19 individualized issues predominate over any that might be common to the purported class and
20 therefore class treatment is simply not appropriate. Defendants further contend that the action is
21 not maintainable as a FLSA collective action because the Plaintiffs and the purported class are
22 not similarly-situated.

23 Defendants intend to set forth the factual and legal support for their position in a
24 forthcoming motion for an order that this action may not be certified as a class action and motion
25 for decertification of the conditionally certified collective action. Defendants intend to move for
26 such orders before April 2008. Furthermore, Defendants contend that any notice should be
27 stayed pending the ruling on motions to certify.

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1 10. Related Cases

2 The Court has deemed related the *Leonard v. Bimbo Bakeries USA, Inc.* and
3 *Morrison v. Bimbo Bakeries USA, Inc.* actions.

4 11. Relief

5 Plaintiffs seek the following relief:

6 a. Unpaid wages at overtime rates for all overtime work, and unpaid wages
7 for all work for which Plaintiffs allege that they were not paid, including minimum wages, as
8 damages and restitution.

9 b. Waiting time penalties under Labor Code section 203 for all RSRs no
10 longer in Defendants' employ at the time of judgment, as statutory amounts, wages, and
11 restitution.

12 c. The amounts provided for in Labor Code section 226.7 for failure to
13 provide meal periods, to be awarded under the statute, and to the extent permitted by law, as
14 restitution.

15 d. The amounts provided for in Labor Code section 226(b) for failure to
16 provide itemized wage statements, be awarded under the statute, and to the extent permitted by
17 law, as restitution.

18 e. Injunctive relief to prohibit Defendants from engaging in the violations
19 alleged.

20 12. Settlement and ADR

21 The parties previously filed a Stipulation and Proposed Order Selecting Early
22 Neutral Evaluation ("ENE") as an ADR process. Defendants' position is that any ADR process
23 should take place after the Court has heard any motions on class and/or collective certification.

24 13. Consent to Magistrate Judge for all Purposes

25 Defendants have filed a non-consent to assignment of this case to a United States
26 Magistrate Judge for disposition or trial, and the case has been reassigned to a United States
27 District Judge.

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1 14. Other References

2 Defendants do not believe that this case is suitable for any references.

3 15. Narrowing of Issues

4 The issues in this action have already been narrowed on summary judgment.

5 BBU anticipates that the class certification process will also narrow the issues further.

6 16. Expedited Schedule

7 This is not the type of case that can be handled on an expedited basis with
8 streamlined procedures. The discovery and motions leading up to and including the motions for
9 summary judgment consumed two and one half years.

10 17. Scheduling

11 a. The non-expert discovery cutoff in this case shall be thirty (30) days
12 before trial.

13 b. The expert discovery cutoff in this case shall be fifteen (15) days before
14 trial.

15 c. Any and all written discovery will be propounded such that a response
16 shall be due on or before the discovery cutoff date.

17 d. If a party chooses to designate for trial any expert witnesses under Fed. R.
18 Civ. Proc. 26(a)(2), said designation shall be made by sixty (60) days before the date of trial, as it
19 may be continued from time to time.

20 e. If a party chooses to designate any rebuttal expert witnesses in response to
21 the other party's initial expert witness designation, said designation shall be made by thirty (30)
22 days before trial.

23 f. BBU intends to move for decertification of the conditionally certified
24 collective action and for an order determining that this action may not be maintained as a class
25 action prior to April 2008. Further, BBU contends that notice should be stayed (subject to a
26 tolling of the statute of limitations) until the certification issues can be decided.

27 g. Pre-Trial Conference: September, 2008.

28 h. Trial: October, 2008.

1 18. Trial

2 Both sides have requested trial by jury.

3 19. Disclosure of Non-Party Interested Entities or Persons

4 Defendants are not aware of any non-party interested entities or persons, although
5 they note the case the Court has already deemed related.

6
7 DATED: November 9, 2007

8 Bingham McCutchen LLP

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11 By: _____/s/
12 Wendy M. Lazerson
13 Attorneys for Defendants
14 Bimbo Bakeries USA, Inc. and George Weston
15 Bakeries, Inc.

PROPOSED CASE MANAGEMENT ORDER

IT IS HEREBY ORDERED that the following schedule shall apply to this action:

a. The actions *Leonard, et al. v. Bimbo Bakeries USA, Inc., et al.*, Case No.

C 05-00829 JW (HRL) and *Morrison, et al. v. Bimbo Bakeries USA, Inc., et al.*, Case No. C 07-03156 JW , shall be consolidated for all purposes.

b. The non-expert discovery cutoff in this case shall be thirty (30) days before trial.

c. The expert discovery cutoff in this case shall be fifteen (15) days before trial.

d. Any and all written discovery will be propounded such that a response shall be due on or before the discovery cutoff date.

e. If a party chooses to designate for trial any expert witnesses under Fed.R.Civ.P. 26(a)(2), said designation shall be made by sixty (60) days before the date of trial, as it may be continued from time to time.

f. If a party chooses to designate any rebuttal expert witnesses in response to the other party's initial expert witness designation, said designation shall be made by thirty (30) days before trial.

g. Motion for class certification, to determine that the action may not be maintained as a class action, and for decertification of the conditionally certified collective action no later than April, 2008.

h. Pre-Trial Conference: September ____, 2008.

i. Trial: October ____, 2008.

DATED: ____, 2007

By: _____
The Honorable James Ware
United States District Judge